Supreme Court, U. S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM, 1978

No. 77-1158

JOHN BRETT ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOHN BRETT ALLEN,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on November 29, 1977.

CITATIONS TO OPINIONS BELOW

The only opinion written by the United States District Court for the Eastern District of Pennsylvania

in this action is reported at *United States v. Allen*, 425 F. Supp. 78 (E.D. Pa. 1977), which deals with an issue concerning whether Petitioner might properly be sentenced as a [illegible]d offender, which is an issue not germane to this Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Third Circuit in *United States v. Allen* is not yet reported but is reproduced in the Appendix hereto at Appendix A.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was made and entered on November 29, 1977. A timely filed Petition for Rehearing was denied by the Court of Appeals on January 16, 1978. By Order dated January 27, 1978, the Court of Appeals stayed its mandate pending the filing of this Petition. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did Not The Court Below Err In Refusing Petitioner's Motion For Production Of A Confidential Informant For *In Camera* Examination By The Trial Judge During Pretrial Hearings On A Search And Seizure Question?
2. Did Not The Lower Court Err In Applying The *Opperman* Standard To The Search And Seizure In The Case, Where Exigent Circumstances Under The *Chadwick* Standard Did Not Exist?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV to the United States Constitution – Searches and Seizures

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner and two co-defendants, Richard John Cooper and Thomas J. Meador, were tried in the United States District Court for the Eastern of Pennsylvania on an Indictment returned by a grand jury of that District charging, as here pertinent, conspiracy to possess marijuana with intent to distribute it in violation of 21 U.S.C. §841(a)(1) and 846.

Prior to trial, all defendants moved to suppress a quantity of marijuana found by federal drug agents in the rear of a truck which was allegedly within the dominion and control of the defendants, and which formed the possessory object of the alleged conspiracy. The lower court denied the motion, after evidentiary hearing, without written opinion. The District Court likewise denied motions made by all defendants both before and during the pretrial evidentiary hearing for the production of an informant whose information had allegedly led the Government to conduct the search in

question. Specifically, defendants moved for outright production of the informant or, alternatively, governmental assistance in locating the person believed by defendants to have been the informant or, alternatively, for governmental production of the informant for the limited purpose of requiring his interview before the trial judge *in camera.*

Defendants were tried on a written stipulation of fact before the District Court, sitting without a jury, and the lower court found all defendants guilty as charged. Petitioner's post-verdict motions were denied without opinion by the lower court and he was sentenced to a term of imprisonment as a "second offender" pursuant to 21 U.S.C. §841(b)(1)(B) which provides for enhanced penalties for multiple offenders. All defendants appealed from judgment of conviction to the United States Court of Appeals for the Third Circuit. Meador's conviction and sentence were affirmed in a judgment order (No. 76-2251). Cooper's conviction and sentence were reversed with directions to enter judgment of acquittal on the ground of insufficiency of evidence (No. 77-1208). With respect to Petitioner, the Court of Appeals affirmed his conviction but ordered the cause remanded for resentencing on the ground that Petitioner had been improperly sentenced as a second offender (Appendix A). The Mandate of the Court of Appeals has been stayed pending the filing of this Petition for Writ of Certiorari.

In this Petition, Petitioner does not challenge or seek review of the decision of the Court of Appeals to remand the cause for resentencing. Rather, by this Petition, Petitioner seeks review of the decision of the Court of Appeals affirming his conviction.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NEVER EXPRESSLY DECIDED WHAT BURDEN OF PROOF, IF ANY, A CRIMINAL DEFENDANT MUST MEET TO BE ENTITLED TO THE PRODUCTION, FOR *IN CAMERA* EXAMINATION BY THE TRIAL JUDGE, BY THE GOVERNMENT OF A "CONFIDENTIAL INFORMANT" WHOSE INFORMATION ALLEGEDLY FORMS THE BASIS FOR A SEARCH AND SEIZURE, WHEN A MOTION FOR SUCH PRODUCTION IS MADE BY A CRIMINAL DEFENDANT DURING A PRETRIAL EVIDENTIARY HEARING. THE INSTANT CASE PRESENTS AN APPROPRIATE CASE TO CONSIDER THIS ISSUE WHICH IS BOTH IMPORTANT FOR FEDERAL LAW AND RECURRENT, BECAUSE THE DISTRICT COURT AND COURT OF APPEALS ERRONEOUSLY APPLIED THE *ROVARIO* STANDARD TO THIS ISSUE AND DENIED PETITIONER'S TIMELY AND WELL FOUNDED MOTION FOR PRODUCTION IN THE DISTRICT COURT.

In cases illustrated by *United States v. Nixon*, 418 U.S. 683 (1974), this Court in recent years has effectively conferred upon the Government in criminal investigations and criminal prosecutions extraordinary powers to compel the production of evidence relevant to issues of fact in criminal prosecutions. This Court has explained the decisions in this area of the law by reference to the necessity of production of all evidence

that would bear upon the truth of matters to be adjudicated by a Court or investigated by a grand jury.

In the present case we ask this Court to accept the instant case for review on the fundamental ground that a similar right to the production of relevant evidence is vested in a criminal defendant and such right was denied Petitioner in the criminal prosecution sought to be reviewed.

During pretrial evidentiary hearings in the instant matter, the defense developed, it is submitted, a consistent pattern of misrepresentation of fact by federal agents both in an affidavit used for a search warrant in this case and, additionally, in testimony during the evidentiary hearing. Specific misrepresentations of fact were demonstrated concerning information that the seizing agents allegedly had *before* the search in question, when in reality they did not obtain this information until *after* the search (N.T. 2-35; 2-45; 2-119; 2-120; 3-4: 4-9, 11; 2-66). Additionally, probable misrepresentations of fact were developed concerning whether indeed the "confidential informant" claimed by the Government even existed (N.T. 2-50-51; 2-63).

Petitioner argued, unsuccessfully, that he was entitled to the production of the confidential informant for *in camera* examination* by the trial judge for determining whether the misrepresentations in question were intentional, in which event Petitioner argued that he

*Petitioner alternatively argued that he had made a sufficient showing warranting the outright production of the informant in open court or a sufficient showing to warrant Government assistance in locating the person whom Petitioner believed was the informant, if in fact an informant existed.

was entitled to the suppression of all evidence found during the search in question: *United States v. Armocida*, 515 F.2d 29, 41 (3d Cir. 1975).

Citing *United States v. Rovario*, 353 U.S. 53 (1957), the Court of Appeals held:

> We conclude that the lower court did not err in finding that the informant's testimony was not necessary to the defense. Appendix A

In so holding, the Court of Appeals effectively held Petitioner in the matter to the burden of proof required by the *Rovario* case, which dealt with the production of an informant in a manner wherein his identity would be learned by the defense.

But the instant matter presents a distinct question: what burden must a defendant sustain to be entitled to the production of an informant during pretrial evidentiary hearings for *in camera* examination by the trial judge wherein the identity of the informant will not be learned by the defense?

We submit that the *Rovario* standard is inapplicable here and the special considerations which favor protection of an informant's confidentiality are not present where an *in camera* examination is sought.

In *United States v. Howell*, 514 F.2d 710 (5th Cir. 1975) and *United States v. Freund*, 525 F.2d 873 (5th Cir. 1976) the Fifth Circuit Court of Appeals has suggested that a defendant's burden for such production, i.e. *in camera* examination, is not governed exclusively by the *Rovario* standard. Likewise, in *United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976) the Fifth Circuit has said that the so-called "informer's privilege" is irrelevant where the identity of the informer is known to the defense. Likewise, where

in camera production is sought the informer's privilege should play no role.

We submit that this Court should grant review in the instant matter to determine whether the present case should be remanded to the District Court with instructions to conduct an *in camera* examination of the informant as requested by the defense.

II.

THE COURT SHOULD REVIEW THE INSTANT CASE BECAUSE THE *CHADWICK* TEST OF EXIGENT CIRCUMSTANCES WAS NOT MET IN THE INSTANT CASE INVOLVING A TRUCK SEARCH WHEREIN THE TRUCK IN QUESTION WAS SEARCHED WITH A WARRANT, FOUND DEFECTIVE BY THE DISTRICT COURT, BUT THE DISTRICT COURT UPHELD THE LAWFULNESS OF THE SEARCH ON THE GROUND THAT EXIGENT CIRCUMSTANCES WERE PRESENT.

In the present matter, federal agents seized the defendants and the truck in question, taking defendants and truck into their custody at the time of arrest. A search warrant was obtained while the truck was in the agents' custody and the rear portion of the truck opened revealing the drugs.

At the hearing on defendants' motion to suppress, the lower court found the warrant defective for reasons not pertinent here.

However, the lower court upheld the search on the ground that exigent circumstances permitted the search

without warrant and that the search was justified on the authority of *South Dakota v. Opperman*, 428 U.S. 364 (1976). The Court of Appeals likewise upheld the search on the *Opperman* authority.

We submit that the present case is governed by *United States v. Chadwick*, ____ U.S. ____, 21 Crim. L. Repr. 3169 (1977), holding that the mobility of a footlocker did not justify dispensing with a search warrant because once federal agents had it within their control there was not a danger that the contents would be removed.

We submit that *Chadwick* applies to the present matter. Once the agents had the truck in their custody, exigent circumstances no longer existed. Indeed, the graphic proof of this inheres in the fact that the agents held the truck in their custody while obtaining a warrant. When this warrant was found defective, it should have effectively required suppression of the evidence.

We submit that the Court should review the instant matter to determine the applicability of *Chadwick* to a truck search under these circumstances.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari be granted directed to the Court of Appeals for the Third Circuit for review of the decision of that Court affirming Petitioner's conviction.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1192

UNITED STATES OF AMERICA

v.

ALLEN, JOHN BRETT,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 76-218-1)

Argued October 6, 1977

Before: GIBBONS and WEIS, *Circuit Judges*, and STEEL,* *District Judge*

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OPINION OF THE COURT

(Filed November 29, 1977)

GIBBONS, *Circuit Judge*

John Brett Allen and two others were convicted of conspiracy to possess marijuana, with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and 846.[1] Before the trial, the government had filed an information charging that Allen was a second offender under the federal Controlled Substances Act and therefore liable to increased punishment. After a non-jury trial held on stipulated facts, the district court sentenced him to imprisonment for eight years, a fine of $20,000, and a special parole term of four years. The prison term is three years longer, and the fine $5,000 higher, than the statutory maximum for the offense of which he was convicted. 21 U.S.C. §§ 841(b)(1)(B) and 846. Allen contends that his conviction should be set aside because the court erred both in refusing to suppress evidence seized at the time of his arrest and in refusing to compel the government to produce an informant. He also urges that the court erred in imposing an enhanced sentence based upon a prior conviction which had not become final. We affirm his conviction but remand for resentencing.

This case involves a shipment of marijuana from Boulder, Colorado, to Pottsville, Pennsylvania. A Drug Enforcement Administration agent in Phoenix, Arizona, had received a tip that the shipment was to be made, that Allen was to meet it in Pottsville, and that it was to be delivered to Connecticut purchasers. He notified his counterpart in Pennsylvania, who located a Ryder rental truck at a Pottsville motel where two men, giving Colorado ad-

1. The conviction of co-defendant Thomas J. Meador was affirmed by another panel of this Circuit. United States v. Meador, No. 76-2251 (June 20, 1977) (judgment order). The appeal by co-defendant Richard John Cooper is disposed of in an opinion of this panel, filed simultaneously with this opinion. United States v. Cooper, No. 77-1208.

dresses, had registered. The agent learned that the two men remained at the motel while a third man drove away in the Ryder truck, accompanied by a station wagon bearing Connecticut license plates. Both vehicles were later located at a hunting cabin near Pottsville occupied by Allen, who was there arrested. The Ryder truck was seized, and a later search revealed approximately 1100 lbs. of marijuana. After an evidentiary hearing the district court concluded that the seizure was justified by exigent circumstances and that the search, although conducted with a defective warrant, was justified by the rule in *South Dakota v. Opperman,* 428 U.S. 364 (1976). We find no error in this ruling.

At the hearing on the suppression of evidence, the defendants moved for the production of the confidential informant who had tipped the Phoenix agent. The defendants contended that the informant's testimony bore on the reasonableness of Allen's arrest and the seizure of the truck. The district court ruled that reasonable cause was established when the informant's tip was verified by the arrival of the Ryder rental truck, by Allen's presence in Pottsville, and by the presence of the station wagon bearing Connecticut license plates. We conclude that the lower court did not err in finding that the informant's testimony was not necessary to the defense. *See United States v. Rovario,* 353 U.S. 53 (1957) and *United States v. Jackson,* 384 F.2d 825 (3d Cir. 1967), *cert. denied,* 392 U.S. 932, 933 (1968).

Turning to Allen's contention that he should not have been subjected to an enhanced sentence, we must begin with 21 U.S.C. § 841(b)(1)(B) which provides for recidivists as follows:

> If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States

> relating to narcotic drugs, marijuana, or depressant or stimulant substances, *have become final,* such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both.

(Emphasis added.) The procedure for establishing a prior conviction is set forth in 21 U.S.C. § 851. Before trial the United States Attorney must file an information stating the previous conviction. 21 U.S.C. § 851(a)(1). After conviction the court must inquire whether the defendant affirms or denies the information. 21 U.S.C. § 851(b). If the defendant denies a conviction or contests its validity, the court must hold an evidentiary hearing on any issues raised by the defendant's response. 21 U.S.C. § 851(c)(1).

In this case Allen admitted that he had been convicted in the United States District Court for the District of Colorado on June 25, 1975, for conspiracy to import marijuana and that he had been sentenced for that offense on August 8, 1975. He urged, however, that the Colorado conviction was not, either prior to his trial or at the time of his conviction, final within the meaning of § 841(b)(1)(B) because an appeal was still pending before the Tenth Circuit.[2] The district court rejected this argument and imposed the enhanced sentence because it construed the words "have become final" to refer only to proceedings at the trial level. *United States v. Allen,* 425 F. Supp. 78 (E.D. Pa. 1977).

As the district court acknowledged, there is no case law interpreting the statute in its present form, and the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, § 401, 84 Stat. 1260, which introduced the "have become final" language, is inconclusive. Prior to 1970, 26 U.S.C. § 7237 had included the phrase "previously been convicted." The lower court, finding no clue as to why that language had been replaced, looked instead to what was

2. That conviction was subsequently affirmed in April 1977.

perceived to be the overall congressional intent in the Act of 1970: to deal harshly with recidivists.

One obvious difficulty with that analysis is that the prior statute also treated recidivists harshly. There is no hint in the legislative history of the 1970 Act that Congress contemplated more harshness toward them than theretofore. Another difficulty is that Congress must have been aware that several federal courts had interpreted the language "previously been convicted" to mean convicted in the lower court. *See Rogers v. United States,* 325 F.2d 485 (10th Cir. 1963), *vacated and remanded for resentencing,* 378 U.S. 549 (1964) and *Gonzalez v. United States,* 224 F.2d 431 (1st Cir. 1955). Thus Congress omitted language which had been interpreted as permitting sentencing under the recidivist provision despite the fact that the first conviction was pending on appeal.

The *Rogers* case illustrates the problem Congress probably had in mind when it substituted the words "has become final" for the words "previously been convicted." In *Rogers* the first conviction was ultimately reversed, and the Supreme Court had to send the defendant back for resentencing on the second conviction. It seems likely that Congress intended to avoid that problem by limiting recidivist sentencing to cases in which the conviction has become final, in the sense that the time for appeal has expired or a pending appeal has been disposed of. We can speak only of likelihood and probability, for the word "final" can have different meanings in different contexts, and—on the particular usage involved in this case—there is no enlightening legislative history. Nonetheless, we can find some guidance in a well-known rule of construction: penal statutes must be strictly construed.

Considering that rule of construction, the ambiguity of the term "final", the alteration of the earlier language which had been held to include convictions on appeal, and the probable congressional awareness of the *Rogers* problem, we construe § 841(b)(1)(B) to mean that a prior conviction is not final for purposes of recidivist sentencing

while that conviction is subject to direct appellate review. We are reinforced in our position by the weight of authority among state courts that, while an appeal is pending, the defendant cannot be considered as having been convicted for purposes of a recidivist statute. Annot. 5 A.L.R. 2d 1092 (1949). *See also* A.L.R.2d Later Case Service (1971, 1977).

The government argues that the *Rogers* problem—the problem of vacating an enhanced second sentence predicated on an overturned conviction—was dealt with by Congress in 21 U.S.C. § 851(c)(2) which provides *in toto*:

> A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, which particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

This subsection, the government urges, affords the defendant the opportunity—the only opportunity—to litigate the validity of the prior conviction before the second sentencing court.

This interpretation of § 851(c)(2) is not reasonable one. On its face the subsection refers, not to all erroneous convictions, but only to those tainted by unconstitutionality. Obviously, the provision was inserted in the statute in order to permit a collateral attack on an unconstitutional, but final, conviction before the imposition of an additional sanction based upon it. We hold that the subsection deals only with prior judgments which are not pending on appeal. If we were to construe it to be applicable to judgments of conviction which are not final, in the ap-

pellate finality sense, we would introduce the possibility that the second sentencing court—and the court of appeals reviewing its judgment—could pass on legal issues pending in another appellate tribunal. This, in turn, would make possible conflicting results, with all their attendant complications and embarrassments. Certainly, Congress never intended such a construction.

Allen also contends that an enhanced sentence should not have been imposed on him because, although the information required by 21 U.S.C. § 851(a)(1) was filed before trial, it was not served on him or his counsel prior to trial, as required by the statute. It has been held that strict compliance with the legislatively mandated pretrial filing requirement is a jurisdictional prerequisite to the imposition of an enhanced sentence, even when the particular failure did not prejudice the defendant. *United States v. Noland*, 495 F.2d 529 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974). Whether this rule should be extended to cover the requirement that the information be served on the defendant or his counsel need not be decided in this case, however, since we hold that the Colorado conviction, not being final at the time of the trial, did not fall within the enhanced sentence provision in 21 U.S.C. § 841(b)(1)(B).

The judgment of sentence will be vacated, and the case remanded to the district court for resentencing within the range permitted for a conviction under 21 U.S.C. §§ 841(a)(1) and 846 without regard to the Colorado conviction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1192

UNITED STATES OF AMERICA

v.

ALLEN, JOHN BRETT,

Appellant

(D.C. Crim. No. 76-218-1)

Before GIBBONS, GARTH, *Circuit Judges*,
and STEEL,* *District Judge*

O R D E R

Appellant's petition for rehearing before the original panel is hereby denied.

By the Court,

/s/ John J. Gibbons
Circuit Judge

Attest

Thomas F. Quinn,
Clerk

Dated: January 16, 1978

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*Honorable Edwin D. Steel, Jr., United States District Judge for the District of Delaware, sitting by designation.